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IN THE
COURT OF APPEALS OF INDIANA

JOHN A. FRIEND, III,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 41A01-0604-CR-150
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JOHNSON CIRCUIT COURT
The Honorable K. Mark Loyd, Judge
Cause No. 41C01-0508-FB-20

March 6, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

John A. Friend, III appeals his sentence for intimidation as a class D felony,[1] criminal confinement as a class B felony,[2] domestic battery as a class A misdemeanor,[3] and adjudication as an habitual offender.

We reverse and remand.

ISSUE

Whether the trial court erred in sentencing McKinnon.

FACTS

Nichole Parr and Friend became engaged on November 23, 2004. During the evening of December 1, 2004, Parr and Friend started drinking at their apartment. Although Parr did not want any, Friend "would pour [gin] and make [her] drink it." (Tr. 258). Parr "ended up getting sick" after Friend "told [her] to drink one last shot." (Tr. 258). Parr began vomiting in the bathroom but became upset with Friend when he let her hair fall into her vomit. Friend then "threw [her] hair [and] walked out of the room." (Tr. 259).

Afterwards, Parr went into the living room to discuss an upcoming trip to Florida with Friend, but Friend "got irate." (Tr. 259). Friend began "yelling" and saying that Parr "was going to leave him." (Tr. 260). Friend told Parr "that he was going to take his last piece of pussy because [she] was going to leave." (Tr. 260). Friend then pushed Parr

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[1] Ind. Code § 35-45-2-1.

[2] I.C. § 35-42-3-3.

[3] I.C. § 35-42-2-1.3.

onto the sofa and got on top of her. When Friend could not get an erection, "he grabbed [Parr's] throat and threw [her] to the ground," where he "tried again" but "still couldn't get an erection." (Tr. 262). Friend "then threw [Parr] by [her] arm to the couch and tried again," but "[i]t didn't work." (Tr. 262).

Friend told Parr that "he knew one way that he could get an erection" and "forced [her] to perform oral sex" by "push[ing] [her] down on [her] knees" and "grabb[ing] [her] head . . . ." (Tr. 262-63). Once Friend got an erection, he "grabbed [Parr] and pulled [her] on the couch and got on top of [her] and forced [her] to have sex with him." (Tr. 263). Friend then "started strangling [Parr] and told [her] to put [her] arms around him or he was going to . . . fuckin' kill [her]." (Tr. 263). Friend finally stopped when Parr's son woke up, crying.

After Parr got her son and brought him into the living room, she and Friend began arguing. Friend told Parr to go the bedroom and not to move. Parr went into the bedroom. Friend followed Parr into the bedroom and began strangling her again. Friend also tried to put a toy "inside of" Parr, but Parr stopped him. (Tr. 269).

Shortly thereafter, Friend left the bedroom. When Parr went into the bathroom, Friend "c[a]me in there and said 'What are you trying to do? Are you trying to escape because if you are I will fucking kill you.'" (Tr. 269). Friend then grabbed Parr's throat, dragged her from the bathroom into the bedroom, "slammed [her] to the ground" and started strangling her. (Tr. 270). Friend eventually stopped strangling Parr and left her on the floor. Friend, however, began to again strangle Parr intermittently over a period of

"about four (4) hours," only stopping when he ran out of cigarettes and left to get more. After Friend left, Parr ran out of the apartment and flagged down a police officer.

On June 21, 2005, the State charged Friend with Count 1, intimidation as a class D felony; Count 2, criminal confinement as a class B felony; and Count 3, domestic battery as a class A misdemeanor. The State also filed an information against Friend, alleging him to be an habitual offender.

The trial court held a jury trial from February 14, 2006 through February 17, 2006. The jury convicted Friend of all counts and found him to be an habitual offender.

According to the pre-sentence investigation report ("PSI"), Friend had two convictions for resisting law enforcement as class A misdemeanors in 1999, a conviction for theft as a class D felony in 2000, a conviction for public intoxication as a class B misdemeanor in 2001, and two convictions for forgery as class C felonies in 2003. The PSI also indicated that Friend was sentenced to probation for one of the resisting law enforcement conviction and for the theft conviction; Friend's probation, however, was revoked both times. Furthermore, Friend was on probation for the forgery convictions when he committed the instant offense.

The trial court held a sentencing hearing on March 27, 2006. The trial court found as follows:

> [Y]ou come before the Court with certain aggravating circumstances and certain mitigation that exist in the case. I certainly find that these crimes as [sic] this point in time our [sic] out of character for your prior history. I can find quite easily that you have a support group. People who care about you. The reason that is important is once you get out of the Department of Corrections [sic], you are still going to be a very young man, you will still have an awful lot of living a head [sic] of you. You can either choose to do

> it productively or you can take the opportunity to continue down the path that you treaded on previously. I don't care how you interpret the evidence in this case. There is no way for us to look at your criminal record and say that you are headed in a positive course. . . . [I]t can't be done. . . . You have at least six prior convictions. You have at least two if not three prior felonies. You have two prior violations of probation and apparently have violated probation as a result of this conduct at issue. You have previously received, maximum felony sentences, receiving a split sentence at, if you will the advisory four years. There is no rational perspective that would suggest to me that we would start out with anything less than a presumptive sentence or an advisory sentence in this particular matter. So I am going to start if you will at that. . . . You previously have had the opportunity for probation, short term imprisonment, mid term imprisonment, that hasn't kept you to date from participating in criminal conduct. Therefore, we will escalate the sentence and continue to escalate it until we finally catch your attention or we just keep you detained so that you are away from people.

(Tr. 814-17). The trial court then sentenced Friend to concurrent sentences of 910 days on Count 1; 18 years, with 6 years suspended, on Count 2; and 365 days on Count 3. The trial court also sentenced Friend to a sentence of 15 years for being an habitual offender, to be served consecutively with his other sentences.

DECISION

Friend asserts that the trial court abused its discretion when it sentenced him to enhanced sentences on Counts 1 and 2.[4] Specifically, Friend argues the trial court failed to "explain why each circumstance was aggravating or mitigating and to articulate the evaluation and balancing of circumstances . . . ." Friend's Br. 12.

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[4] The statutory sentencing range for a class D felony was 6 months to 3 years, with the presumptive sentence being a fixed term of 1½ years. I.C. § 35-50-2-7. The statutory sentencing range for a class B felony was 6 to 20 years, with the presumptive sentence being a fixed term of 10 years. I.C. § 35-50-2-5. Subsequent to the date of Friend's offense and prior to the date of his sentencing, the legislature amended Indiana Code section 35-50-2-4 to provide for an "advisory" rather than a "presumptive" sentence. *See* P.L. 71-2005, § 7 (eff. Apr. 25, 2005).

We review a trial court's sentencing decision for an abuse of discretion. *Edmonds v. State*, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), *trans. denied, cert. denied*, 127 S. Ct. 497 (2006). In order for a trial court to impose enhanced sentences, it must 1) identify the significant aggravating and mitigating circumstances; 2) relate the specific facts and reasons that the trial court found those to be aggravating and mitigating circumstances; and 3) demonstrate that the trial court has balanced the aggravating and mitigating circumstances. *Bostick v. State*, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004).

Here, the trial court did not specifically mention that it weighed the circumstances. However, its discussion of the aggravating circumstances and one mitigating circumstance adequately demonstrates that it engaged in an evaluation and balancing of the circumstances in determining Friend's sentence. Thus, we find the trial court properly imposed enhanced sentences.

We, however, sua sponte, consider another issue: whether the sentence imposed due to Friend's habitual offender status is authorized by statute. We find that it is not.

> A habitual offender finding does not constitute a separate crime nor result in a separate sentence, but rather results in a sentence enhancement imposed upon the conviction of a subsequent felony. In the event of simultaneous multiple felony convictions and a finding of habitual offender status, trial courts must impose the resulting penalty enhancement upon only one of the convictions and must specify the conviction to be so enhanced.

Greer v. State, 680 N.E.2d 526, 527 (Ind. 1997) (internal citation omitted); *see* I.C. § 35-50-2-8 (providing that the sentence imposed upon a finding of habitual offender shall enhance the sentence for the underlying conviction rather than impose a separate penalty).

In this case, the trial court imposed a sentence not authorized by statute when it imposed a separate sentence for the habitual offender finding, rather than enhancing one of Friend's felony sentences. Because the trial court improperly sentenced Friend, we reverse and remand the case to the trial court for re-sentencing in accordance with this opinion.

Reversed and remanded.

BAKER, J., and ROBB, J., concur.